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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC. AND MARGARET BROTHERTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Postmaster General of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on December 16, 1954.

OPINIONS BELOW

The opinions in the Court of Appeals are not yet reported but are reproduced in the Appendix, *infra*, pp. 1A-21A. The District Court issued no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1954 (Appendix, *infra*, pp. 21A-22A). By order of the Chief Justice dated March 12, 1955, the time for filing a petition for a writ of certiorari was extended to and including March 23, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the civil mail obscenity statute (39 U.S.C. 259a) is limited to mail relating to particular matter which has been specifically found to be obscene, or whether it applies to all mail addressed to a person found to be a vendor of obscenity such as the publisher of a magazine several past issues of which have been determined to be obscene.

2. Whether the court below erred in declining to consider and resolve the question of the validity of the particular administrative determination of obscenity before proceeding to broad questions, which may not have been necessary to decision, of the possible constitutional invalidity and general scope of 39 U.S.C. 259a.

STATUTE INVOLVED

The Act of August 16, 1950, c. 721, 64 Stat. 451, 39 U.S.C. 259a, provides:

> upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the

mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partner-

ship, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes.

STATEMENT

Respondents brought this action to enjoin the Postmaster General from enforcing his Orders Nos. 55219 and 55220, issued pursuant to a determination, made after hearing, that the magazines published by respondents were obscene within the meaning of the Act of August 16, 1950, c. 721, 64 Stat. 451, 39 U.S.C. 259a, *supra*. These orders direct the appropriate local postmasters to intercept all mail addressed to respondents, stamp it "Unlawful," and return it to the sender. The local postmasters were also directed to refuse to pay any money orders addressed to respondents (J.A. 38-40).[1]

These orders resulted from the following proceedings: On September 23, 1952, and December 4, 1952, the Solicitor for the Post Office Department filed with the Chief Hearing Examiner of that Department administrative complaints against respondents (J.A. 13-19). These complaints alleged that the Solicitor "has probable cause to believe that * * * there is being conducted through the mails an enterprise in violation of the provisions of 39 U.S. Code 259a." The complaints further alleged that respondents' magazines contained lewd and obscene photographs of nude men and women

[1] References to "J. A." are to the printed Joint Appendix filed in the Court of Appeals.

and that these magazines were made available to anyone who remitted the subscription price through the mail or paid the purchase price on the newsstands. Respondents filed answers denying the allegations of the complaints (J.A. 20-27), whereupon the Post Office Department gave them due notice of a hearing and held such a hearing on February 16, 1953, at which respondents appeared with counsel (J.A. 28).

At the hearing, copies of the publications in question, 25 different issues of *Sunshine and Health*, 7 different issues of *Sun Magazine*, and 1 issue of *Natural Herald*, were introduced into evidence. (See Original Exhibits filed with the Record.) Respondents admitted all the allegations in the complaints except the charges that the magazines were obscene, lewd, lascivious and indecent; and that respondents were receiving remittances through the mails for the magazines (J.A. 28). The parties filed proposed findings of fact, conclusions of law and supporting reasons, and the hearing examiner rendered his initial decision on March 27, 1953. After finding that the respondents were receiving remittances through the mails for the magazines (J.A. 29), the hearing examiner determined that the magazines were obscene, basing that finding particularly upon unretouched photographs of nude females showing at close range the breasts, buttocks, and pubic areas; and unretouched photographs of men showing the private parts (J.A. 30-32).

Pursuant to the Post Office Department rules of practice, respondents appealed to the Postmaster

General and on June 23, 1953, the Postmaster General found that, because of their photographs, respondents' magazines were obscene by any recognized standard (J.A. 35-37). On that same date, the Postmaster General issued the above-described orders. (J.A. 38-40).

On July 2, 1953, this action was brought in the United States District Court for the District of Columbia seeking a declaratory judgment and an injunction on the grounds that the orders violated the First and Fifth Amendments to the Constitution (J.A. 2-13). Respondents' motion for a preliminary injunction was heard by the District Court on July 13, 1953 (J.A. 75), and the parties stipulated that its determination of that motion would be dispositive of the entire case (J.A. 76). The record before the District Court consisted of the administrative record alone.

Observing that he could see no limit to his power in the case except his own opinion, the district judge stated, "I just do not agree with the Postmaster General and I grant the injunction." (J.A. 88-89). The court's order, filed on July 16, 1953, granted the injunction on the ground that the publications "are not obscene and do not fall within the provisions of 39 U.S.C. 259a" and that the orders of the Postmaster General are invalid (J.A. 90). The court made no finding whether the Postmaster General's determination was arbitrary or capricious or whether there was insufficient evidence to support the order.

The District Court's judgment was appealed

upon the ground that the district judge had unlawfully substituted his judgment for that of the Postmaster General, and that the Postmaster General's determination should have been sustained unless found to be arbitrary or not supported by evidence. The majority of the court below affirmed the District Court's judgment but on entirely different grounds, which are described below.

REASONS FOR GRANTING THE WRIT

1. 39 U.S.C. 259a, *supra*, pp. 2-4, permits the Postmaster General, satisfied by evidence that a vendor of obscenity is obtaining or attempting to obtain money through the mails for his merchandise, to "* * * instruct postmasters * * * to return *all* * * * mail" (emphasis added) addressed to such vendor to the originating post office and thence to the senders, with the word "Unlawful" stamped on the mail matter. Postal money order sums payable to such a vendor would also be returned to the remitters. The statute contemplates an investigation to determine whether a business or course of dealing for the purpose of selling obscenity has been established and, if such a business or course of dealing is shown to exist, an order by the Postmaster General to local postmasters to stop incoming mail to the vendor. On its face, the statute does not envisage inquiries or hearings directed only against past offerings of particular pieces of obscenity. Rather it is the going concern, and "all," not merely part of, the incoming mail to that going concern, which is

reached by the statutory language, words which cover both past and future dealings in the proscribed merchandise.

The majority of the court below refused to accept this as the scope and purpose of 39 U.S.C. 259a. The court felt that "grave constitutional questions" would be raised if the statute be read as authorizing the issuance of orders which reached incoming mail in connection with future issues of respondents' publications. Accordingly, the plain language was limited so as to permit the issuance of orders which halted incoming mail only in connection with *past* issues specifically found to be obscene; to the extent that they went beyond the statute as thus limited, the orders in this case were held bad.[2] This reading of the statute, which we believe to be mistaken, has had the practical effect of nullifying the use of Section 259a by the Post Office Department and of excising it from the body of federal remedies against obscenity.

(a). First, the court's constitutional doubts seem to us to have been unduly magnified.[3] Congress has, in the pattern of statutes into which 39 U.S.C.

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[2] It should be noted that respondents, in the court below, while urging the invalidity of the statute as a prior restraint (see *infra*, p. 11), did not suggest that any variation from the plain language of the statute be adopted by the court, or that the orders issued here be changed or limited.

[3] The opinion below does not discuss at length the court's constitutional difficulties but they appear to revolve around the First Amendment. See the quotation from the opinion of Mr. Justice Douglas in *Stanard* v. *Olesen*, 74 Sup. Ct. 768, 771, and the citations at Appendix, *infra*, pp. 7A, 13A).

259a fits, vested unusual powers in the Postmaster General and this court has upheld that authority. It is against this background that 39 U.S.C. 259a. should be viewed. That statute is substantially identical with 39 U.S.C. 259 (Appendix, *infra*, pp. 23A-24A), the law which contains the Postmaster General's power to act in connection with fraudulent enterprises, lotteries, and similar matters. In turn, the statute now embodied in 39 U.S.C. 259 has been substantially unchanged since its first enactment in 1872. 17 Stat. 322. This legislation has been challenged on several constitutional grounds (including those which appear to trouble the court below) and its validity has been sustained. *Donaldson* v. *Read Magazine*, 333 U.S. 178; *Public Clearing House* v. *Coyne*, 194 U.S. 497.

Giving to 39 U.S.C. 259a the same broad scope as its prototype statutes, we submit that the constitutional validity of the plain language and purpose of the Section, and the orders issued under it in this case, is supported by the *Read Magazine* and *Public Clearing House* decisions. In the former, this Court sustained the fraud order statute and the Postmaster General's interpretation of that statute on all fours with the construction embodied in the orders in the instant case, against contentions that either or both violated the First, Fourth, Fifth, Sixth or Eighth Amendments. 333 U.S. at 189-191. The order there upheld was not limited to incoming mail relating to *past* issues of the magazine. In fact, the magazine company expressly urged that the order, if applicable in the future, was a prior

restraint. Brief for Respondents in Answer to Questions Propounded by the Court, October Term, 1947, No. 50, p. 50. In sustaining the order against this and similiar contentions, this Court said that its "future effect is merely to enjoin the continuation of conduct found fraudulent." 333 U.S. at 191. By necessary implication the *Read Magazine* case would seem to validate the present orders in reaching incoming mail with regard to future as well as past issues of respondents' publications. See, also, *Public Clearing House* v. *Coyne*, 194 U.S. 497, 510 (quoted in the dissenting opinion below).

Passing the actual decision in *Read Magazine*, the court below sought to place reliance on the special circumstances preceding final submission of that case to this Court. The enterprise there involved was large and complex and the fraudulent activity constituted a small feature of the total business. The Postmaster General's orders, as originally drafted, served to cut off the entire incoming mail to the enterprise and its staff. As modified after the original argument in this Court, the order forbade delivery of incoming mail only to that department which was conducting the fraudulent contest. It was this modified order which was sustained.

There is no problem comparable to that originally posed in *Read Magazine* with respect to the breadth of the orders in this case. Here, the whole magazines have been found to be obscene and therefore "unlawful." As was admitted by respondents, the photographs of nudes found to be obscene form an

indispensable part of all issues, and all issues relate almost exclusively to nudist activities. A large number of past issues were specifically found to be obscene (*supra*, p. 5). Therefore, unlike the *Read Magazine* case, no "lawful" (*i.e.*, not connected with the use of obscene material) activity of respondents is being reached along with the unlawful activities. Thus, the dissimilar circumstances of the modification of the order in the *Read Magazine* case should not have moved the court below to curtail the scope of the statute involved here and the orders properly issued thereunder. Rather, the court should have sustained the validity of the statute, if that issue had to be reached, and should have seen both the statute and this Court's prior decisions as justifying the impact of the orders with regard to both past and future mail coming to respondents.[4]

(b). Nevertheless, the court required that all orders issued under Section 259a be effective to halt delivery only of mail relating to particular issues of periodicals already published and found to be ob-

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[4] We do not discuss the other constitutional objections made by respondents in their brief below because the Court of Appeals made no mention of any of them; we wish, however, to reserve the right to meet those arguments in our brief should certiorari be granted. In our opinion, those constitutional objections to the statute have previously been resolved against the position of respondents in a series of cases, including, *inter alia*, *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407; *Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288; *Rosen* v. *United States*, 161 U.S. 29; *In re Rapier*, 143 U.S. 110; *Ex parte Jackson*, 96 U.S. 727; *United States* v. *Rebhuhn* 109 F. 2d 512 (C.A. 2), certiorari denied, 310 U.S. 629; *Tyomies Publishing Co.* v. *United States*, 211 Fed. 385 (C.A. 6).

scene; mail relating to future publications was not to be stopped. After imposing this limitation upon the statute, the opinion then purports to permit amendment of the Postmaster General's orders to comply with the limitation, but, as the majority itself seems to have recognized, this would be impossible. The opinion states (App., *infra*, p. 12A), "Whether such limitation is practically possible, in cases like the present, is not for this court to determine." It is plain, however, that the court's limitation of the statute would render it unenforceable against any periodical and probably unenforceable against most obscene matter.

Existing statutes make it unlawful for the Postmaster General or local postmasters to open any first class mail not addressed to them.[5] It is therefore clear that, under the interpretation given below to Section 259a, *no* mail addressed to respondents or to the publishers of any other periodicals found to be obscene could be intercepted and returned to the sender as the statute clearly directs, for certainly no postmaster could determine from examination of the outside of an envelope whether the contents relate to future or past issues of the publication.

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[5] 18 U.S.C. 1703; 18 U.S.C. 1717(c). It will be noted that 39 U.S.C. 259 contains an express disclaimer of any authorization to open mail for purposes of enforcing that Act whereas Section 259a contains no such disclaimer. However, the Postmaster General has not interpreted this difference as impliedly superseding prior legislation and giving broad powers of inspection over all mail, in order to enforce the obscenity statute.

If the decision below forbade the enforcement of 39 U.S.C. 259a only against magazines or other regularly published periodicals, it would have been sufficiently disruptive of the functions of the Post Office Department to warrant this petition for certiorari. But the effect of the decision is even broader than that. By its terms, the ruling would apply to any periodic mailings of photographs or other printed matter that could conceivably be brought within the penumbra of the First Amendment. And if the decision be construed as based on the Fifth and Sixth Amendments, as well as on the First,[6] then it would apply to *any* articles, matters or things—even those not normally protected by First Amendment rights—which are mailed out at intervals. It is already current practice for some dealers in indecent pictures and pamphlets to solicit remittances for periodically issued series of nude photographs or films and to include with each shipment a subscription form or order blank for future issues of similar pictures. If the decision of the Court of Appeals were to become law the Postmaster General would be helpless to prevent this dissemination of obscene matter since he could not effectively prevent the continuous influx of orders to dealers in these materials, as Congress has authorized and directed him to do.[7]

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[6] See fn. 4, *supra*, p. 11.

[7] Some impression of the magnitude of the problem posed by mailings of obscene matter can be gained from the fact that during the first six months of the fiscal year 1955 the Post Office Department made approximately 1220 administra-

Congress has on numerous occasions expressed its desire to prevent use of the mails for transmission of obscene matter and has currently provided three sanctions to discourage that transmission: (a) criminal penalties (18 U.S.C. 1461); (b) nonmailability of matter found to be obscene (18 U.S.C. 1461); and (c) withdrawal of postal services for delivery of mail *to* senders of obscene matter (39 U.S.C. 259a). The first of these sanctions has thus far proved to be largely ineffective because the burden of proof upon the Government is quite properly heavy, fines are often too small to discourage large-scale operators, and criminal proceedings necessarily take time during which much obscene mailings continue, thus frustrating the basic aim of preventing the use of the mails for distribution of such materials. The second sanction is easily avoided by using first class mail which is not subject to inspection by postal authorities.[8] Without inspection, postmasters are powerless to bar the mails since there is no practicable way of detecting the presence of obscene matter. The third sanction, involved in this case, was enacted by Congress in 1950 at the special request of the Postmaster General in order to counterbalance the inadequacies

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tive rulings under 39 U.S.C. 259a. Of that number, approximately 75% were rulings of obscenity. These figures represent a 72% increase over the first six months of fiscal year 1954.

[8] Although first class mail is generally far too expensive for the usual periodical, in the case of obscene magazines, photographs, and pamphlets, the price charged normally is, or can be, high enough to defray the higher postage rates.

of the other statutes. H. Rept. No. 2335, 81st Cong., 2d Sess. The decision of the court below effectively nullifies this considered congressional action.

It is entirely reasonable, as well as constitutional, for the Postmaster General to enforce the statute as it was written and as Congress intended. In this particular case, it is certainly not unreasonable to assume, on the basis of a consistent pattern of past behavior, that respondents' magazines will continue to print unretouched photographs of nude adults showing their private parts and areas. Respondents insist that such photographs are essential to their magazines. If, however, it should be decided to change the character of the magazines, respondents are always free to apply for a new ruling by the Postmaster General.[9] If assumptions based upon a course of past conduct could not be made, there would be no way of enforcing this kind of statute and no really effective means of preventing the flow of obscene matter through the mails, short of permitting postal inspection of all mail—a prohibitively expensive and obviously undesirable practice.

2. This Court has repeatedly held that federal courts should avoid unnecessarily broad decisions, particularly on constitutional questions, unless the resolution of such issues cannot be avoided in dis-

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[9] See, for example, Section 51.28, Post Office Department Rules, 12 Fed. Reg. 7942-7944, providing for revocation and modification of fraud orders upon affidavit that the enterprise against which the order was directed is no longer being conducted.

posing of the case. *United States* v. *Guy W. Capps, Inc.*, 348 U.S. 296; *United States* v. *Harriss*, 347 U.S. 612, 627; *United States* v. *Rumely*, 345 U.S. 41; *Alma Motor Co.* v. *Timkin-Detroit Axle Co.*, 329 U.S. 129. It might appear, superficially, that the court below acted in compliance with this rule. In our view, the opinion makes a mistaken invocation of the rule. The court should here have reached and decided the relatively narrow question brought before it by the appeal, namely, whether there was substantial evidence in the administrative record to support the Postmaster General's finding of obscenity in this particular case [10] or whether the district court was justified in substituting its own judgment for that of the Postmaster General (*supra*, p. 6) and in finding respondents' magazines not obscene.[11] The majority of the court declined to consider this issue but instead concerned itself

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[10] It is established that under 39 U.S.C. 259, the Postmaster General's decision may not be overturned unless there is no substantial evidence to support it or unless it was not fairly arrived at. *Leach* v. *Carlile*, 258 U.S. 138; *Bates & Guild Co.* v. *Payne*, 194 U.S. 106; *Farley* v. *Simmons*, 99 F. 2d 343 (C.A. D.C.), certiorari denied, 305 U.S. 651.

[11] The dissenting judge expressed the belief that the Postmaster General was correct in finding the photographs to be obscene, and other issues of these same magazines have, in two other judicial proceedings, been found to be obscene. *Sunshine Book Co.* v. *Summerfield*, D.D.C., Civil No. 74-55 (decided February 16, 1955); *Sunshine Book Co.* v. *McCaffrey*, 112 N.Y.S. 2d 476 (Sup. Ct. N.Y. Co., 1952). However, it was open to the Court of Appeals to decide otherwise and to affirm the District Court on that ground, and, had it done so, the constitutional and broad statutory issues would never have been reached.

with the far more serious questions of the general reach of Section 259a in all cases and whether "grave constitutional questions" exist if the statute is read as we contend it must be. If the court had followed the normal tradition, it would have decided the administrative question first and may then have been able to leave open the more important general questions for future resolution. This broad, far-reaching and, we think, erroneous decision virtually nullifying Section 259a might have been avoided had the court met first things first. Cf. *United States* v. *Guy W. Capps, Inc., supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH, 1955.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12026

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLANT

v.

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC., AND MARGARET BROTHERTON, APPELLEES.

Appeal from the United States District Court for the District of Columbia

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Decided December 16, 1954

Mr. Edward H. Hickey, Attorney, Department of Justice, with whom *Messrs. Leo A. Rover,* United States Attorney, and *Stephen W. Terry,* Attorney, Department of Justice, were on the brief, for appellant. *Mr. Lewis A. Carroll,* Assistant United States Attorney, entered an appearance for appellant.

Mr. O. John Rogge for appellees. *Mr. Josiah Lyman* entered an appearance for appellees.

Mr. Edward de Grazia filed a brief on behalf of American Civil Liberties Union, as amicus curiae, urging affirmance.

Before EDGERTON, WASHINGTON and DANAHER, Circuit Judges.

WASHINGTON, *Circuit Judge:* This is an appeal from a decision of the United States District Court for the District of Columbia enjoining the enforcement of two orders of the Postmaster General of the United States.[1] These orders were based on findings that appellees' publications were obscene within the meaning of 39 U.S.C. § 259a (1951).[2]

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[1] Nos. 55219 and 55220, dated June 23, 1953.

[2] "§ 259a. Exclusion from mails of obscene, lewd, etc., articles, matters, devices, things, or substances.

"Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership, or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

"(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

"(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes."

They provided that all mail addressed to the appellees was to be stamped "Unlawful" and returned to the senders, or, if nothing on the letters indicated the senders, forwarded to the dead letter branch of the Post Office. They further prohibited the payment of any postal money order drawn to the order of appellees, and instructed the local Postmaster to inform any remitter that payment was forbidden and that the amount thereof should be applied for and obtained by the remitter under the regulations of the Department.

The publications involved — Sunshine and Health, Solaire, Universelle de Nudisme magazine (also referred to as Sun magazine), and Natural Herald—are nudist magazines which advocate and explain nudism and the nudist mode of living. They are illustrated with photographs of nude men, women and children, singly or in groups, sometimes shown as engaged in nudist living activities, sometime shown in posed shots. Some of the pictures show the nude subjects at a distance and some show close views. Some of the pictures show the sexual parts of their subjects. Each of the issues of the magazines submitted at the Post Office hearings, with one exception, bore on the cover a large photograph in color of a nude young woman or women. There were also one, and sometimes two, other full-page posed photographs of a nude young woman or women in each issue of the magazines.

In the Post Office proceedings the Solicitor of the Post Office Department did not charge that the text of the magazines as such was obscene; in his view obscenity attached only to the photographs of nude men and women accompanying the text and appearing on the cover. The Hearing Examiner and the

Postmaster General so found. Appellees, on the other hand, contend that without appropriate illustrations of nudist life much of the force of the text of the magazines would be lost. They say that such pictures, as used in these publications, merely illustrated and amplified the text by showing people practicing nudism in a normal and healthy environment and in the happy enjoyment of thoroughly innocent activities. According to appellees, the pictures used were the antithesis of anything suggestive or pornographic, some of the pictures were not without positive artistic merit, and all of them presented the human form "in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth." (Br. 3.)

Thereafter appellees brought proceedings in the District Court seeking to enjoin the enforcement of the order. At the hearing of the request for a preliminary injunction all parties agreed that the decision of the court on that request should be treated as a decision on appellees' prayer for a permanent injunction. At the end of the hearing the court found that the magazines taken as a whole were not likely to promote lustful feelings or excite the sexual passions and were not obscene. Accordingly, the court granted the permanent injunction requested by the appellees.

On this appeal, appellant contends that the court below incorrectly substituted its own opinion for the determination of the Postmaster General that the appellees' publications were obscene, that there was sufficient evidence of obscenity to support the determination of the Postmaster General as a proper exercise of his statutory function, that the

exclusion from the administrative hearing of expert testimony on the question of obscenity was not a denial of due process, and that neither the statute nor the Postmaster General's orders violated the First or Fifth Amendments of the Federal Constitution.

Appellees, on the other hand, contend that 39 U.S.C. § 259a does not apply to the transmission through the mails of books, magazines or other publications, but that, if it is so applicable, it was applied by the Postmaster General in the instant case in a manner which violates the First Amendment of the Constitution of the United States, in that it constitutes a prior restraint upon the freedom of the press in contravention of that Amendment, and a penalty imposed for the exercise of a right guaranteed thereunder. Appellees further contend that the Postmaster General's application of the statute was an unreasonable means, if any at all, of accomplishing the ends sought by Congress; that it was based upon a standard so vague and nebulous as to contravene the due process clause of the Fifth Amendment of the Constitution; that Section 259a was inapplicable to appellees' publications under the doctrine of *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94 (1902); and that in any event the decision of the court below holding the publications of the appellees not to be obscene was correct.

We turn first to appellees' contention that Section 259a is not applicable to publications. Section 259a, in describing the forbidden class of mail, uses broadly the words "article, matter, thing, device or substance." It does not, however, refer specifically to books, pamphlets and copies of magazines. It is

thus in sharp contrast to other statutes in this general field, where Congress was careful to spell out the impact of the legislation on published works and periodical literature.[3] But the issue here involves not the magazines published by appellees as a whole, but only the pictorial illustration of their text. Such pictures may well constitute "matter" within the purview of Section 259a. The few cases in which this section has been applied by the courts point to that conclusion. In *Rouzer* v. *Fanning* (Unreported, SD.Cal.Civ. No. 138-54) the statute was applied to photographic color transparencies, and in *Door* v. *Donaldson*, 90 U.S. App. D.C. 188, 195 F. 2d 764 (1952), it was treated as including motion picture films. The conclusion that Section 259a may be applied to pictures is supported by the fact that it was patterned on Section 259 of the same Title, which permits the imposition of similar restrictions on the rendering of postal services in cases where the mails are used in furtherance of fraudulent schemes. Under that section steps have been taken to restrict indirectly the circulation of printed matter,[4] although fraud orders under that section do not appear to have been directed against the publication of magazines as such.[5]

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[3] An example is the criminal statute against mailing obscene matter, 18 U.S.C. § 1461 (1951). See also 18 U.S.C. § 1462 (1951); 19 U.S.C. § 1305 (1951).

[4] See, for example, Donaldson v. Read Magazine, 333 U.S. 178 (1948); Reilly v. Pinkus, 338 U.S. 269 (1949).

[5] But *cf.* Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579 (1910), where the court seems to have assumed the power of the Postmaster General to exclude from mailing under postal regulations then in effect copies of a newspaper carrying an advertisement deemed fraudulent. However, an injunc-

We must therefore reject the contention that Section 259a is wholly inapplicable to the pictorial illustrations involved in this case. But we must nevertheless recognize that the power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power "that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and Sixth Amendments guarantee." This warning was given by Mr. Justice Douglas in a case which recently came before him on application for a stay.[6] He went on to emphasize that "the power to impound mail should not be lightly implied," and that the exercise of that power "may as effectively close down an establishment as the sheriff himself."[7]

Should this court then construe Section 259a to authorize the issuance of orders of indefinite duration which hamper or prevent the continuance of the publication and distribution of a magazine—

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tion against the local postmaster was granted there because the court found that the advertisement was actually not fraudulent.

[6] Stanard v. Olesen, (opinion of Douglas, Circuit Justice, 9th Cir., May 22, 1954) 74 Sup. Ct. 768, 771, 98 L. Ed. 710, 712, citing the dissents of Mr. Justice Holmes and Mr. Justice Brandeis in Leach v. Carlile, 258 U.S. 138, 140, and in United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 417, 436, and the concurring opinion of Judge Frank in Roth v. Goldman, 172 F. 2d 788, 790 (2d Cir. 1949); *cf.* Hannegan v. Esquire, Inc., 327 U.S. 146, 157-158, 160 (1946).

[7] 74 Sup. Ct. at 771.

with a substantial and admittedly innocuous text—because its past issues have been found to contain some obscene illustrations, although none of its future issues may contain obscene matter within the meaning of the statute? In determining this question—which we think is crucial to the case—we are aided by a decision of the Supreme Court in a somewhat similar situation, arising under Section 259.

In *Donaldson* v. *Read Magazine*, 333 U. S. 178 (1948), the Postmaster General had issued a fraud order to prevent receipt of mail relative to a contest conducted by the defendant's magazines, and the receipt of money orders by which would-be contestants were paying fees to enter into the contest, because the advertising for the contest was deemed by him to have been false and fraudulent. The Supreme Court of the United States sustained this finding of fact. But the Postmaster General's order prohibited not only the delivery of mail and the payment of money orders made payable to the puzzle contest or the contest editor, but also the delivery of all mail addressed, and the payment of all money orders payable, to the defendant's magazines "Facts" and "Read" and their personnel. The order was not limited to the particular fraudulent contest. On this point, the Supreme Court said (333 U. S. at p. 182):

> "The order, if indefinitely enforced, might have resulted in barring delivery of mail and payment of money orders in relation to other non-fraudulent contests as well as legitimate magazine business. All of the foregoing raised questions about the validity and scope of the

original order, if unmodified, which we deemed of sufficient importance to justify further argument. For that reason we set the case down for reargument, requesting parties to discuss the validity and scope of the order, and whether, if invalid by reason of its scope, it could be so modified as to free it from statutory or constitutional objections."[8]

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[8] The Court's order read as follows:

"This case is ordered restored to the docket for reargument. On reargument counsel need not further discuss the sufficiency of the evidence to support the Postmaster General's findings. They are requested to discuss the following:

"1. Does the fraud order prohibit delivery of mail and postal money orders to Facts Magazine and all its employees, including its editor-in-chief? If so,

"(a) Is the order within the Postmaster General's authority under 39 U.S.C. Secs. 259, 732?

"(b) If so, do these code provisions, in violation of the First Amendment or any other constitutional provisions, abridge the freedom of speech or press of either the senders or the sendees of the mail or the money orders?

"2. Does the fraud order prohibit indefinitely the delivery of mail or money orders which relate to subject matters or contests other than the contest on which the order is based? If so,

"(a) Is the order within the Postmaster General's statutory authority?

"(b) If so, are these code provisions in conflict with the Constitution of the United States?

"3. Assuming that the order is in conflict with the code provisions or the Constitution, can it be modified in such way as to free it from statutory or constitutional objections? If so, by whom can the order be modified and by what procedure?" (333 U.S. at p. 182)

Before reargument, however, the Postmaster General revoked his order insofar as it applied to the lawful activities of the defendant and limited his order to contest mail.[9]

While, therefore, the issue as to the validity of the Postmaster General's original order in the *Read Magazine* case was not squarely decided, the attitude of the Court indicates strongly that orders under Section 259 must be limited to those activities of a defendant which are unlawful, and that future lawful activities of a defendant cannot be hampered in cases where he is engaged both in lawful and in unlawful activities.[10]

This limitation upon the Postmaster General's powers would seem to apply equally to action under Section 259a. That section was enacted by Congress in 1950 upon the request of the Postmaster General, because he considered that he did not pos-

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[9] See, also, Hoover v. M'Chesney, 81 Fed. 472 (C.C. Ky. 1897) (local postmaster's right to withhold mail limited to such mail as was clearly connected with the prohibited lottery conducted by plaintiff). But see Public Clearing House v. Coyne, 194 U.S. 497, 510 (1904), rejecting this distinction. However, these cases involve the complainant's conduct of what was solely an illegal business.

[10] In the instant case continuance of appellees' business would be hampered or restrained by the Postmaster General's order as long as it remained in force, even though appellees in fact complied in future issues of their magazines with the standards indirectly imposed by the Postmaster General. It has been suggested in an ordinary fraud case not involving a magazine that the order should be held valid because in the event of cessation of fraudulent conduct the addressee of mail could bring a further suit to enjoin continued enforcement of the order against him (Neher v. Harwood, 128 F. 2d 846 (9th Cir. 1942)). This possibility is, however, hardly an adequate protection of appellees' rights.

sess legislative authority to impose adequate sanctions upon persons disseminating obscene matter, although mailing it was punishable as a crime under 18 U. S. C. § 1461. The Postmaster General reported to Congress that under the then state of the law he could refuse delivery of mail to persons selling obscene articles only within the narrow confines of 39 U. S. C. § 255 (1951), that is, if addressed to a fictitious, false or assumed name or address. He could not, he said, act against an addressee operating either under his true or corporate name. On the other hand, Section 259 of Title 39 (1951), authorizing return of mail and nonpayment of money orders, was limited to addressees engaged in frauds. In asking for the passage of the bill, which later became Section 259a, the Postmaster General stated that—

> "In line with the authority vested in the Postmaster General in fraud cases by sections 259 and 732, title 39, United States Code, the proposed legislation is sought to authorize the Postmaster General to return to senders marked 'Unlawful' all mail addressed to persons, firms, corporations, companies, partnerships or associations engaged in obtaining remittances of money or property of any kind through the mails in exchange for obscene, lewd, lascivious, indecent, filthy or vile articles, matters, things, devices, or substances, and to refuse to cash money orders and postal notes in connection therewith. This legislation will not unduly broaden the powers of the Postmaster General. He already has the power to return to senders mail addressed to concerns

> engaged in selling obscene materials under fictitious names. The proposed legislation merely broadens his authority to cover these cases where true or corporate names are used.
>
> "It is believed that the proposed legislation submitted herewith is adequate to accomplish the purpose desired and its enactment is recommended." [11]

This legislative background suggests that the Postmaster General's powers under Section 259a are to be construed in much the same manner as his powers under the fraud section, 39 U. S. C. § 259. Clearly, the Postmaster General did not seek, and Congress did not intend to confer upon him, wider powers in regard to the prevention of dissemination of obscene matters through the mails than he possessed with regard to the prevention of the use of the mails for frauds.

In consequence, orders of the Postmaster General under Section 259a appear to be subject to the same necessary limitations as were indicated in the *Read Magazine* case. They must be confined to materials already published, and duly found unlawful. Whether such limitation is practically possible, in cases like the present, is not for this court to determine. It may perhaps be argued that the sweeping orders here involved should be upheld—contrary to all the inferences to be drawn from the *Read Magazine* case—on the ground that from past unlawful conduct of appellees, as the Postmaster General sees it, he may conclude that such conduct will continue and that he will again have cause to

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[11] Sen. Rep. No. 2179, 81st Cong., 2d Sess. (1950).

find future issues of the magazines obscene.[12] But there is and can be no finding now that any particular future issue of the appellees' magazines will be obscene and will provide a basis for the sanctions which the Postmaster General may impose under Section 259a. To let the present orders stand would permit the Postmaster General to prevent—in practical effect—the continued publication of a magazine without any advance knowledge that its future issues will be in violation of law, and thus to suppress putatively lawful activities.[13] Grave constitutional questions would then be presented. See *Donaldson* v. *Read Magazine, supra* at pp. 181-182, 189 *et seq.*; *Hannegan* v. *Esquire, Inc., supra*; *Stanard* v. *Olesen, supra* at pp. 770-771. See also *Superior Films* v. *Department of Education of Ohio*, 346 U. S. 587 (1954); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 502 (1952).

We do not interpret Section 259a as authorizing orders which raise serious constitutional questions of this sort. We cannot conclude, in the light of these considerations, that Congress intended by the enactment of Section 259a to authorize the indefinite suppression of periodical publications because one or another issue may contain obscene material. Some day Congress may perhaps give that authorization in specific terms, with proper

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[12] There is no contention that each and every past issue of each and every magazine published by the appellees is obscene. In fact, obscenity is only predicated upon the presence of certain illustrations upon the cover of and inside the magazines, their text being admittedly unobjectionable.

[13] See United States *ex rel.* Milwaukee Publishing Co. v. Burleson, supra (Brandeis, J., dissenting); Reilly v. Pinkus, 338 U.S. 269, 277 (1949).

guidance for and restrictions on administrative action, and with such safeguards as the Constitution may require. But Congress has not done so here.

Nothing in this opinion should be read to preclude the Postmaster General from taking appropriate steps to amend the orders issued against the appellees to limit them to their proper statutory scope within 39 U. S. C. § 259a, as defined in this opinion. Nothing herein is intended to prevent him from taking in the future such other action against appellees under 39 U. S. C. § 259a as may be appropriate. However, as they now stand, the orders of the Postmaster General herein are too broad and exceed the powers conferred upon him by 39 U. S. C. § 259a. It follows that the judgment of the District Court enjoining their enforcement should be affirmed.

In this view of the case, it does not become necessary to pass upon other questions raised by the appellees as to the constitutionality or applicability of this statute, as to the propriety of the Postmaster General's finding that the publications involved in his orders were obscene (see *Parmelee v. United States*, 72 U. S. App. D. C. 203, 113 F. 2d 729 (1940)) or the adequacy of the evidence and record upon which such a finding was based in the instant case.

Affirmed.

DANAHER, *Circuit Judge*, dissenting: I agree that 39 U. S. C. § 259a (1952) quoted in the majority opinion has applicability here. I agree that the Postmaster General's powers under that section "are to be construed in much the same manner

as his powers under the fraud section, 39 U. S. C. § 259," as the majority observes. However, I would reverse the order of the District Court, and I wish briefly to note the reasons for the position I take.

The Constitution vested in Congress the power not only to establish post offices and post roads but to regulate the entire postal system of the country, even to the exclusion from the mails of "such printed matter or merchandise as may seem objectionable to it upon the ground of public policy . . ." *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507 (1904). More importantly and bearing directly upon the issue presented here, the Court said, at page 507, that in aid of enforcement of its public policy, Congress possesses the power to "forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception *or the dissemination among its citizens of information of a character calculated to debauch the public morality.*" (Emphasis supplied.) Again, *Id.* at 508, the Court continued: "For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law we believe has never been attacked."

The majority opinion says ". . . orders of the Postmaster General under Section 259a appear to be subject to the same necessary limitations as were indicated in the *Read Magazine* case. They must be confined to materials already published, and duly found unlawful. Whether such limitation is

practically possible, in cases like the present, is not for this court to determine . . ." The position thus stated seems to me to be contrary to that set forth in the *Coyne* case in which the Supreme Court said (194 U. S. at 510):

> "Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may include letters of a purely personal or domestic character, or having no connection whatever with the prohibited enterprise. In view of the fact that by these sections the Postmaster is denied permission to open any letters not addressed to himself, there would seem to be no possible method of enforcing the law except by authorizing him to seize and detain all such letters. It is true it may occasionally happen that he would detain a letter having no relation to the prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, prima facie at least, all such letters are identified with such business. A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts."[1]

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[1] In Donaldson v. Read Magazine, 333 U.S. 178, 190 (1948), the Supreme Court itemized a series of statutes and com-

Just as Congress has power to control the use of the mails for perpetration of swindling schemes, in the exercise of that same power it authorized the Post Office Department to act with reference to the exclusion from the mails of obscene matter "*upon evidence satisfactory to the Postmaster General.*" (Emphasis supplied.)

In this case the Hearing Examiner found that "the obscene and indecent character of the magazines at issue is evident from a mere inspection thereof." The Postmaster General "upon evidence satisfactory to him" determined that the material in question was "obscene by any standard recognized by the courts. Considering all whom the publications are likely to reach in their sale to the public generally, it is certain that they are erotically and lustfully stimulating and sexually provocative to the average male person viewing

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mented: "All of the foregoing statutes, and others which need not be referred to specifically, emphasize a purpose of Congress to utilize its powers, particularly over the mails and in interstate commerce, to protect people against fraud. The governmental power has always been recognized in this country and is firmly established. The particular statutes here attacked have been legally enforced by the executive officers and the courts for more than half a century. They are now part and parcel of our governmental fabric . . ." Specifically rejecting the contention that the court should overrule the Coyne case, *Id.* at 194, the Court continued: "None of the recent cases to which respondents refer, however, provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes."

Against this background Congress enacted § 259a, the applicability of which is here involved.

them."[2] Despite the Postmaster General's exercise of the authority vested in him, the trial judge said: "I see no limit except my own judgment in this case," (J.A. 86) and again "I just do not agree with the Postmaster General and I grant the injunction." (J.A. 89).

In *National Conference on Legalizing Lotteries, Inc.* v. *Farley*, 68 App. D.C. 319, 321, 322, 96 F. 2d 861 (D.C. Cir. 1938), *cert. denied*, 305 U.S. 624 (1938), this court applying the standard prevailing under § 259 said "In view of what has been already said, it is apparent that the question here is whether there was any reasonable basis for believing that the present contest is a lottery or 'scheme for the distribution of money * * * by * * * chance,' for if there was, the action of the Postmaster General must stand. If not, there is no statutory basis for his order, and it must fall." That was the test as announced by Chief Judge Groner and he concluded that "the law commits the initial decision

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[2] The findings of the Hearing Examiner disclose that the respondents "are obtaining and endeavoring to obtain remittances of money through the mails . . . and are depositing or causing to be deposited in the United States mails, information as to where, how and from whom such magazines may be obtained . . . ."

Submitted as evidence were 24 issues of "Sunshine and Health," a monthly publication, from March 1951 through March 1953, 7 issues of "Sun Magazine," a bi-monthly publication, from January-February 1952 to March-April 1953, and the July 1952 issue of "Natural Herald." After reciting specific details as to the particulars in which the publications were found to be obscene, the Hearing Examiner concluded: "It is clear that the magazines here involved are sold and distributed to all who wish to purchase them, whether they be men, women or children. The public is solicited generally and indiscriminately . . . ."

to the discretion of the Postmaster General, who is authorized to act 'upon evidence satisfactory to him,' and we are powerless unless his ruling is palpably wrong." See also *Farley* v. *Simmons,* 69 App. D.C. 110, 99 F. 2d 343 (1938), *cert. denied,* 305 U.S. 651 (1938).

In *Near* v. *Minnesota,* 283 U.S. 697, 715-716 (1931), Chief Justice Hughes said: "The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases . . .," and as one such he notes "On similar grounds, the primary requirements of decency may be enforced against obscene publications."

The material here was found by the Postmaster General to be obscene. If it were open to me to pass on the exhibits, I would agree. The case is not like *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146 (1946), where, at page 158, Mr. Justice Douglas noted "The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted." At page 159, Mr. Justice Frankfurter, concurring, noted even the more sharply the distinction between the *Esquire* case and one like this when he pointed out "Matters that are declared nonmailable (Criminal Code § 211; 35 STAT. 1129, 36 STAT. 1139; 18 U.S.C. § 334) are of course not 'literature' within the scope of the second-class privilege."

The only officer designated to administer the will of Congress in this situation is the Postmaster

General. Unless his findings are "palpably wrong," the trial court was in error in substituting its judgment for that of the officer commanded to execute the public policy pronounced by Congress. The initial decision of the Hearing Examiner makes clear that he took into account not only the facts and circumstances upon which the hearing proceeded but the law applicable thereto. Cogently, the order of the Postmaster General did likewise. In *Parmelee* v. *United States*, 72 App. D.C. 203, 211, 113 F. 2d 729 (D.C. Cir. 1940), this court said: "The determining question is, in each case, whether a publication, taken as a whole, has a libidinous effect." The Postmaster General "upon evidence satisfactory to him," applied that test and found against the publications. Judge Vinson (later Chief Justice) dissenting in that case, at page 216, cautioned: "Certainly, it seems difficult to conclude that no reasonable man could say that this book offends the community standard and, with a District Court finding that the book with its pictures is obscene, I am unable to understand how my brethren can stand on that proposition." Of course that case involved a libel under the Tariff Act, 19 U.S.C. § 1305(a) (1952), properly triable in the District Court. Here, the court has nothing to do with the findings of the Postmaster General unless they are "palpably wrong." Here, that most of the scores of pictures in a score or more of exhibits are obscene seems to me as plain as the figures and the parts thereof depicted.

I cannot believe that the First Amendment or any other amendment affords protection against previous restraint against publications, the pat-

tern of which so clearly emerges from each separate issue. Thinking thus, I would have no difficulty in concluding that the government may as a matter of public policy withdraw the facilities to pander the obscenity condemned by the Congress. The enforcement of the statute has been committed to the Postmaster General. The trial judge erred in substituting his judgment for that of the duly designated officer and the order of injunction should be reversed.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,026

ARTHUR E. SUMMERFIELD, Individually and as Postmaster General of the United States, APPELLANT

v.

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC., AND MARGARET BROTHERTON, APPELLEES

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Washington, and Danaher, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Washington.

Separate dissenting opinion by Circuit Judge Danaher.

Filed December 16, 1954.

SUPREME COURT OF THE UNITED STATES

No. ——

OCTOBER TERM, 1954

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC., AND MARGARET BROTHERTON

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 23rd, 1955.

(S.) EARL WARREN,
Chief Justice of the United States.

Dated this 12th day of March, 1955.

Rev. Stat. Sec. 3929, as amended, 39 U.S.C. 259:

The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person or company, or to the agent or representative of any such person or company, whether such agent or representative is acting as an individual or as a firm, bank, corporation, or association of any kind, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly written or stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. * * *

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IN THE

Supreme Court of the United States

October Term, 1954

No. 665

ARTHUR E. SUMMERFIELD, individually and as Postmaster General of the United States,

Petitioner,

—v.—

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC. and MARGARET BROTHERTON,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1954

No. .....

ARTHUR E. SUMMERFIELD, individually and as Postmaster General of the United States,

Petitioner,

—v.—

SUNSHINE BOOK COMPANY, SOLAIR UNION NATURISME, INC., COMMERCIAL DISTRIBUTORS, INC. and MARGARET BROTHERTON,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

Questions Presented

In the opinion of respondents the questions here presented are:

1. Whether the Act of August 6, 1950, c. 721, 64 Stat. 451, 39 U. S. C. A. §259a (Public Law 699, 81st Cong., 2d Sess.) (hereinafter sometimes referred to as 39 U. S. C. A. §259a or §259a), applies to the transmission through the mails of books, periodicals, magazines, and similar published documents.

2. Whether §259a authorizes an order affecting future, as well as past issues of a periodical.

3. Whether §259a, as here applied by the Postmaster General, usurps the exclusive power of the States and local communities concerning the offense of obscenity in violation of the Ninth and Tenth Amendments to the United States Constitution.

4. Whether §259a, as here applied by the Postmaster General, is a prior restraint upon the freedom of the press in contravention of the First Amendment to the United States Constitution.

5. Whether §259a, as here applied by the Postmaster General, imposes a penalty for the exercise of a right guaranteed by the First Amendment of the United States Constitution in violation of that Amendment.

6. Whether §259a, as here applied by the Postmaster General, is an unreasonable means of accomplishing the end sought by the Congress in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

7. Whether §259a, as here applied by the Postmaster General, is based upon a standard so vague and nebulous as to contravene the Due Process Clause of the Fifth Amendment to the United States Constitution.

8. Whether, under the doctrine of *American School* v. *McAnnulty*, 187 U. S. 94, §259a is inapplicable to respondents' publications.

9. Whether in the circumstances of this case the District Court below was entitled to determine for itself that respondents' publications were not obscene.

10. Whether there was any substantial evidence to sustain the judgment of the Postmaster General that respondents' publications are obscene.

Counter-Statement of the Case

The complaint and the affidavits submitted by respondents in support of their motion for an injunction stand unanswered, undenied, and uncontroverted. These establish the following (see J. A. 2-10):

Sunshine Book Company is a non-profit New Jersey corporation and is the publisher of a monthly periodical publication entitled "Sunshine & Health" which has had and has a wide circulation both nationally and locally and has been and is being distributed nationally to the forty-eight states both by means of the United States mails and interstate commerce. Sunshine & Health, which has been published and distributed continuously for more than twenty years, is an educational and cultural publication which contains discussions relating to various social ideas, including ideas relating to nudism.

Sunshine Book Company also published "The Story of American Nudism" on or about July, 1950, which was distributed and circulated throughout the United States after having been approved by the Post Office Department for third class or book-rate mailing. This publication, as Sunshine & Health, is devoted to discussions and advocacy of the nudist movement in the United States and is illustrated by appropriate photographs and other artistic displays.

Sunshine Book Company is, further, an agent for the distribution of the publication entitled "Nudist Herald", the official organ of Natural Communities, Inc., and of the Southwestern Sunbathing Conference, which publication is distributed throughout the United States and abroad and is devoted to discussions and advocacy by text and photographic illustration of the doctrine of nudism.

Solar Union Naturisme, Inc., is another non-profit New Jersey corporation and publishes a bi-monthly publication entitled "Sun", which is the official publication of the corporation. Solar is an international, interlingual, interracial association representing the naturist movement all over the world and all levels of nudist organizations,—individual, group, regional, national and international. Sun Magazine is the same type of publication as Sunshine & Health except that it is on an international scale.

Commercial Distributors, Inc., is a New Jersey stock corporation acting as a service agency for and on behalf of Sunshine Book Company and Solar performing services as an intermediary between Sunshine Book Company and Solar and ordinary distributors and other outlets for the publications.

Margaret Brotherton is an officer and employee of Commercial Distributors, Inc., and resides and is a citizen of Spring Lake, New Jersey.

Post Office Box BB at Spring Lake, New Jersey, is a box duly owned and paid for by Commercial Distributors, Inc., and used by it as a receptacle for the receipt of mail; Post Office Box 1000 at Mays Landing, New Jersey, is a box duly owned and paid for by the Outdoor Publishing

Corporation and used as a receptacle for the receipt of mail by Sunshine Book Company, Solar, and others.

In each of the publications pictures illustrate the text. The pictures show nudists in a normal and healthy environment, in the happy enjoyment of thoroughly innocent activities. They are the antithesis of anything suggestive or pornographic. Some of them are not without positive artistic merit and all of them present the human form in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth.

Sunshine & Health has been published and circulated, and distributed through the mails of the United States and abroad for a period of time in excess of twenty years. At no time during that period of publication, distribution and circulation have any of the publishers, distributors or recipients thereof been indicted or otherwise criminally charged with or convicted for its publication, circulation, distribution or receipt through the United States mails under any of the appropriate federal criminal statutes governing the circulation, distribution, or receipt through the United States mails of obscene, lewd. lascivious or fraudulent matter.

On or about September 23, 1952 the then Solicitor for the Post Office Department of the United States filed a complaint, allegedly pursuant to 39 U. S. C. A. §259a, alleging that the respondents therein named, including "Sunshine Book Co., Sunshine Book Company, Sunshine & Health, Solar Union Naturisme, Inc., and Solaire Universelle De Nudisme, at Mays Landing, New Jersey" were conducting an unlawful enterprise through the United

States mails in that they were said to be selling and offering for sale through the said mails the publications Sunshine & Health and Sun Magazine. The complaint recommended that the Postmaster General of the United States issue an order to the Postmaster at Mays Landing, New Jersey to dispose of mail addressed to, and money orders drawn in favor of the above-mentioned respondents, and their agents and representatives as such.

On or about December 4, 1952 the then Solicitor for the Post Office Department of the United States also filed a complaint, allegedly pursuant to 39 U. S. C. A. §259a, alleging that the respondents therein named, including "Commercial Distributors, Inc., M. Brotherton, and Post Office Box BB at Spring Lake, New Jersey, and Sunshine Book Company at Egg Harbor City, New Jersey, and Post Office Box 1000 at Mays Landing, New Jersey" were conducting an unlawful enterprise through the United States mails in that they were said to be selling and offering for sale through the same mails the publications The Story of American Nudism, Sun Magazine, and Sunshine & Health. This complaint recommended that the Postmaster General of the United States issue orders to the postmasters at Spring Lake, New Jersey, Egg Harbor City, New Jersey and Mays Landing, New Jersey, to dispose of mail addressed to, and money orders drawn in favor of the above-mentioned respondents, and their agents and representatives as such.

The respondents named in the complaint as aforesaid duly filed answers to the charges, and by agreement of the parties hearing on the two aforesaid complaints was consolidated and a hearing was conducted before the Hearing Examiner of the Post Office Department of the United

States on the aforesaid charges on or about February 16, 1953. At the hearing, by stipulation, there were received in evidence 25 issues of Sunshine & Health from the March, 1951 issue to and including the March, 1953 issue; 7 issues of Sun Magazine beginning with the January-February, 1952 issue and ending with the March-April, 1953 issue; the July, 1952 issue of Natural Herald; and the publication entitled The Story of American Nudism. Apart from the publications thus admitted in evidence by stipulation, the Post Office Department offered no other proof or evidence to sustain its charges against respondents as aforesaid.

At the hearing, the respondents offered to produce expert testimony relating to the issue of the charged obscenity of the publications for the purpose of proving that nudism and the advocacy of nudism by text and illustration as in the publications did not violate community standards of decency or morality, or accepted practices pertaining to nudism in the fields of art, science, biology, sociology, etc., and that the advocacy of nudism by text and picture as in the publications tended to improve rather than deteriorate or corrupt the morality of the readers of said publications. The motion of respondents to offer and introduce the aforesaid expert testimony was denied over their objection by the Hearing Examiner.

On or about March 27, 1953 the Hearing Examiner made his initial decision upon the charges and held that while the written material in the publications is not obscene, lewd, lascivious or indecent, some of the photographs therein contained of nude men and women were said to be objectionable within the meaning of 39 U. S. C. A. §259a

and it was concluded that the named respondents "are in violation of 39 U. S. C. 259a as charged in the complaint." The Examiner recommended an order for exeeeution by the Postmaster General of the United States for the denial of the use of the United States mail by the respondents for the receipt of any communications or transmittals through such mails. Pursuant to the applicable rules and regulations of the Post Office Department of the United States, respondents duly appealed from the aforesaid determination to the Postmaster General of the United States. On or about June 23, 1953, the Postmaster General, by decision and order of said date, concurred in the finding of the Hearing Examiner as aforesaid.

Thereupon respondents instituted the instant action for declaratory and injunctive relief. After argument before Judge SCHWEINHAUT on July 13, 1953 (J. A. 75-89), that Judge found that the publications "are not obscene", that they "do not fall within 39 U. S. C. A. Section 259(a)", and that "Accordingly, the Orders of the Postmaster General * * * are invalid" (J. A. 90-91). Appropriate injunctive relief was ordered (J. A. 90). From this determination the Postmaster General appealed (J. A. 92).

The Court of Appeals for the District of Columbia affirmed the District Court. Judge WASHINGTON, writing for the majority, answered in the negative the following issue:

> "Should this court then construe Section 259a to authorize the issuance of orders of indefinite duration which hamper or prevent the continuance of the publication and distribution of a magazine—with a substantial and admittedly innocuous text—because its past issues have been found to contain some

obscene illustrations, although none of its future issues may contain obscene matter within the meaning of the statute?"

Of orders issued by the Postmaster General pursuant to §259a, the Court of Appeals said:

> "They must be confined to materials already published, and duly found unlawful. Whether such limitation is practically possible, in cases like the present, is not for this court to determine. It may perhaps be argued that the sweeping orders here involved should be upheld * * * on the ground that from past unlawful conduct of appellees, as the Postmaster General sees it, he may conclude that such conduct will continue and that he will again have cause to find future issues of the magazines obscene. But there is and can be no finding now that any particular future issue of the appellees' magazines will be obscene and will provide a basis for the sanctions which the Postmaster General may impose under Section 259a. To let the present orders stand would permit the Postmaster General to prevent—in practical effect—the continued publication of a magazine without any advance knowledge that its future issues will be in violation of law, and thus to suppress putatively lawful activities. Grave constitutional questions would then be presented."

Judge DANAHER dissented on the grounds that:

> "Here, the court has nothing to do with the findings of the Postmaster General unless they are 'palpably wrong.' Here, that most of the scores of pictures in a score or more of exhibits are obscene seems to me as plain as the figures and the parts thereof depicted.
>
> I cannot believe that the First Amendment or any other amendment affords protection against pre-

vious restraint against publications, the pattern of which so clearly emerges from each separate issue. Thinking thus, I would have no difficulty in concluding that the government may as a matter of public policy withdraw the facilities to pander the obscenity condemned by the Congress. The enforcement of the statute has been committed to the Postmaster General. The trial judge erred in substituting his judgment for that of the duly designated officer and the order of injunction should be reversed."

ARGUMENT

I.

The writ should be denied.

The ruling of the Court of Appeals is premised on the proposition that an order which encompasses within its reach, willy-nilly, the lawful as well as the unlawful, particularly where the lawful activity is that protected by the First Amendment, must be bad and will not be deemed to be impliedly authorized by Congress. There is so little room for quarrel with this rationale, whether on authority or in reason, that we cannot see raised by that ruling an issue of the measure of importance necessary to warrant review by certiorari.

The free circulation through the mails of respondents' publications involves, of course, First Amendment considerations. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146; *Stanard* v. *Olesen*, 74 S. Ct. 768. Petitioner's order would affect past issues of respondents' magazines not found unlawful, and future issues as to which there was not and

could not be any finding of illegality. The order, therefore, plainly is invalid, and unauthorized by §259a, pursuant to those many cases which establish that action directed at an evil resulting from First Amendment activity must be confined solely and exclusively to that evil otherwise it violates the Amendment. *Stromberg* v. *California,* 283 U. S. 359; *DeJonge* v. *Oregon,* 299 U. S. 353; *Herndon* v. *Lowry,* 301 U. S. 242; *Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *New Jersey,* 308 U. S. 147; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Carlson* v. *California,* 310 U. S. 106; *Thomas* v. *Collins,* 323 U. S. 516; *Winters* v. *New York,* 333 U. S. 507.

No aspect of the order of the Postmaster General affords it special exemption from the protection afforded First Amendment rights against the blunderbuss technique. Mr. Justice DOUGLAS said in *Stanard* v. *Olesen, supra,* at 770-771:

> "The power of the Post Office Department to exclude material from the mails and to intercept mail addressed to a person or a business is a power that touches basic freedoms. It might even have the effect of a prior restraint on communication in violation of the First Amendment, or the infliction of punishment without the due process of law which the Fifth and the Sixth Amendments guarantee. See the dissents of Mr. Justice Holmes and Mr. Justice Brandeis in *Leach* v. *Carlile,* 258 U. S. 138, 140, and *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S. 407, 417, 436; cf. *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146. I mention the constitutional implications of the problem only to emphasize that the power to impound mail should not be lightly implied."

In *Donaldson* v. *Read Magazine,* 333 U. S. 178, 184, the majority observed as to orders like that here involved: "Such orders if too broad could work great hardships and inflict unnecessary injuries upon innocent persons and businesses." And of the related exclusion power of the Postmaster General for fraud, this Court wrote in *Reilly* v. *Pinkus,* 338 U. S. 269, 277:

> "Unlike the Postmaster General, the FTC cannot bar an offender from using the mails, an order which could wholly destroy a business. See Brandeis, J., dissenting in *United States ex rel., Milwaukee Social Democratic Pub. Co.* v. *Burleson,* 255 U. S. 407, 417 et seq. The strikingly different consequences of the orders issued by the two agencies on the basis of analogous misrepresentations emphasize the importance of limiting Postoffice Department orders to instances where actual fraud is clearly proved."

More particularly, as the Court of Appeals noted, *Donaldson* v. *Read Magazine, supra,* amply indicated this Court's attitude that orders under 39 U. S. C. §259 (and hence, §259a) must be limited to unlawful activities.[1] *Public Clearing House v. Coyne,* 194 U. S. 497, strongly relied

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1. Petitioner contends that the *Read Magazine* case is distinguishable because in that case the modified order was sustained as to future issues of the magazine. However, that modified order concerned only mail to the contest section and contest editors of the magazine; the contest was found to be fraudulent; and, accordingly, the mail barred was confined to the fraud, the initial perpetration of which was committed by past issues. As the Court said there, the modified order's "future effect is merely to enjoin the continuation of conduct found fraudulent" (333 U. S., at 191). In the instant case the future effect of the order under review would enjoin conduct as to which no finding of obscenity was or could be made.

on by petitioner, is not to the contrary, for the Court there noted:

> "* * * the Postmaster General only forbids the postmaster at Chicago to pay any postal money orders, drawn to the order of the League of Equity and the Public Clearing House, or their officers or agents in their capacity as such, and to inform the remitter of any such postal money order that payment thereof has been forbidden, etc., and to 'return all letters, whether registered or not, or other mail matter which shall arrive at your office directed to such concerns or their officers or agents as such, to postmasters at the office at which they were originally mailed.' There is nothing in the order thus worded that would authorize the postmaster at Chicago to return letters addressed to an individual unless addressed to such individual as officer or agent of the League of Equity or the complainants. There is nothing in this order that would authorize the interference with the private or domestic mail matter of individuals" (194 U. S., at 510-511).[2]

The petitioner has cited to the Court many dire consequences said to follow from the decision below. Of course the conduct complained of by petitioner is already the cognizance of federal and state criminal legislation. See, *e.g.*, 18 U. S. C. A. §1461. But this remedy is said by peti-

2. Similarly, in the many other cases involving Postmaster General fraud orders, the enterprise concerned and the mail received by it were apparently or presumptively devoted entirely to the fraud or lottery condemned by the Postmaster General. Consequently, in our view, no authority sustains the interpretation of §259a as applied by the Postmaster General herein, *i.e.*, the barring of mail concerning past or future issues not found obscene by the Postmaster General and addressed to persons or associations not necessarily or even presumptively involved with the issues obscene to the Postmaster General.

tioner "to be largely ineffective because the burden of proof upon the Government is quite properly heavy, * * * and criminal proceedings necessarily take time * * * " (p. 14). If these administrative inconveniences be put to one side, as they should out of deference to the rights intended to be safeguarded by the procedures the petitioner complains of, the evils envisioned by petitioner subside. And the supposed subversion by the Court below of §259a in various situations hypothesized by petitioner is rendered even more illusory when it is remembered that the decision of that Court is necessarily premised upon questions raised by the barring of mail to publishers of a periodical engaged in the exercise of rights, under the First Amendment, to advocate a cause.

If real, rather than supposed conjured evils be sought here, they are to be found in the following explicit assertion of petitioner to this Court concerning future issues of respondents' publications if his order be sustained:

> "If, however, it should be decided to change the character of the magazines, respondents are always free to apply for a new ruling by the Postmaster General" (p. 15).

Here is arrogation to the Postmaster General of censorship power in classic and pristine form. It is, of course, the position which must be ultimately assumed to uphold petitioner's order; this necessary consequence of petitioner's contentions, perhaps better than any other argument, demonstrates the validity of the ruling below.

II.

If the writ is granted, the questions considered by this Court should include various issues of constitutionality, statutory construction, and fact, anyone of which, if resolved in respondents' favor, would require an affirmance.

We have earlier set forth the questions we deem presented by the case. We do not urge the granting of the writ for the consideration of those questions; as indicated, we think the writ should be denied because the Court below was so plainly right. But we do respectfully submit to the Court that if the writ is granted on the issues raised by petitioner, then many other more serious and important questions are necessarily raised in order to make possible a complete disposition of the matter by the Court. Petitioner has reserved the right to argue those additional questions if certiorari should be granted (p. 11 n. 4), and we here only briefly adumbrate such issues in order that they not be overlooked in any circumstance.

As compared with other cognate federal legislation relating to punishment for and deterrence of the distribution of obscene publications through the United States mails [18 U. S. C. A. §§1461, 1462; 19 U. S. C. A. §1305(a)], §259a makes no explicit reference to books, magazines, periodicals or other published documents. Instead it refers only to tangible commodities in language such as Congress used when it intended to comprehend not publications such as respondents' magazines, but objects intended for an obscene or immoral use. Since §259a authorizes the imposition of devastating sanctions in connection with the property and constitutional rights of respondents to use the United States mails, that section should be literally and

strictly construed and pursuant to such construction deemed inapplicable in the circumstances of this case. Indeed, any other construction of §259a unnecessarily provokes very serious and grave constitutional questions.

In the event that it should be determined that §259a as is here applicable, then the statute is unconstitutional. In the first instance, there is no federal power in the area of obscenity which is an offense only as to a prescribed locality and definable only by the morality of such a locality. Moreover, §259a, as interpreted by petitioner empowers the Postmaster General to deny to respondents and other publishers, upon the basis of certain specific magazine issues, the use of the mails forever, whether in connection with the issues adjudged to be obscene or future issues not yet printed or seen by the Postmaster General. In this view of the Postmaster General's asserted power the statute authorizes a prior restraint upon the press—a restraint uniformly and consistently held to be in contravention to the First Amendment of the United States Constitution. Similarly, as upon the uncontroverted facts in the record herein respondents and their publications were engaged solely and exclusively in the sincere and legitimate advocacy of a cause, *i.e.*, nudism, the imposition of the penalties ordered by the Postmaster General was a violation of that First Amendment as a penalty upon the exercise of a guaranteed First Amendment right.

Section 259a as interpreted by the Postmaster General also runs afoul of the Due Process Clause of the Fifth Amendment to the United States Constitution. For it would authorize the Postmaster General to deny to respondents the receipt of mail or remittances which are and will be wholly unrelated to the particular issues adjudged

obscene by the Postmaster General. While this Court has in various instances sustained the constitutionality of fraud orders of a broad nature by the Postmaster General, an examination of those cases will disclose that the orders were in fact or presumptively narrowly confined to mail pertaining to the fraudulent enterprise which was the basis for the Postmaster General's action. In the instant case no such relationship exists and, accordingly, the statute as construed by the order constitutes an unreasonable and arbitrary means to combat the evil which Congress had in mind when it enacted §259a. Furthermore, since §259a, as interpreted by the Postmaster General, would authorize that executive officer to bar the use of the mails upon his finding that a publication is obscene, the statute is unconstitutional because it is predicated upon the term "obscenity" which, in the context of this statute, is so vague, nebulous and uncertain as to provide no reasonably objective standard of action, thereby committing to the personal subjective opinion of the Postmaster General the question whether the publication is obscene. The term "obscene", if definable at all, has meaning only as a reflection of the mores of a given culture or community. As such, the term "obscene" is too vague and nebulous for definition and objective enforcement. In any event, however capable of definition the word "obscene" may be in other statutory contexts, it is utterly undefinable in connection with §259a. For §259a does not involve any delimited community or culture, it applies to the Nation at large; and it is therefore impossible to ascertain the community which will provide a reasonably objective signification or definition of the term "obscene" in §259a.

Even if §259a were deemed applicable to published materials and constitutional if so applicable, nevertheless under the doctrine of *American School* v. *McAnnulty*, 187 U. S. 94, §259a does not authorize the action here taken by the Postmaster General. For that case establishes that orders such as the Postmaster General issued against respondents may not be based upon matters of opinion but only upon matters of provable fact. In the circumstances of this case it is clear that the action of the Postmaster General was based upon his opinion, not facts. For the Postmaster General acted solely and exclusively upon his reading of the publications and his opinion as to whether those publications complied with the public morality. He refused expert testimony and there was otherwise no proof or data upon which his determination was based.

Finally, we submit that the District Court was correct in determining that the publications here were not obscene. In view of the nature of the proceedings before the Postmaster General and the issues before him, it was appropriate for the District Court to determine for itself whether the publications were obscene; and under any view of the applicable rule of judicial review of administrative agencies the judgment of the District Court must be affirmed because there was no substantial evidence and indeed no evidence to sustain the finding by the Postmaster General of obscenity. The texts of the publications were concededly not obscene; and the illustrations were concededly properly and necessarily related to the text, and entirely consonant therewith. The single fact of the publication of pictures of nudes, where those pictures do not portray any objectionable activity and are not otherwise pornographic, con-

cededly does not constitute obscenity. For the publications to have been declared obscene in such circumstances was, therefore, neither warranted in fact nor in law.

CONCLUSION

The petition for a writ of certiorari should be denied; if granted, the questions considered should include the questions presented herein.

Respectfully submitted,

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